

file

MEMORANDUM

SUBJECT: S. 1428, Criminal Justice Information

Section I

1. The regulatory provisions proposed in S. 1428 would apply to certain kinds of information collected or compiled by "criminal justice agencies." These provisions would apparently extend to information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The term "criminal justice agency" is defined in section 102(6), inter alia, as an agency which performs "criminal justice activities." The term "criminal justice" is defined in section 102(5) as referring "to the activities of a criminal justice agency relating to protection against, detection of, or investigation of criminal offenses" (emphasis added).

2. The foreign intelligence mission of the Central Intelligence Agency is not directed at the detection of criminal offenses as such; yet in its pursuit, information is sometimes obtained which has a bearing on criminal conduct, such as international narcotics trafficking or foreign terrorist activities. The definitions of "criminal justice" and "criminal justice agency" in sections 102(5) and 102(6) respectively are ambiguous and could give rise to an argument that the Central Intelligence Agency is a criminal justice agency to the extent that it gathers information relating to the "detection of ... criminal offenses" in connection with such matters.

3. The Central Intelligence Agency is not a criminal justice agency. It was established by the National Security Act of 1947 to provide the President and his policy advisers with foreign intelligence information. In addition, that Act provides:

... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ... (50 U.S.C. 403).

4. There are at least three reasons why the Central Intelligence Agency is not a "criminal justice agency."

(a) The designation of the Central Intelligence Agency as a "criminal justice agency" would be contrary to existing law and efforts within Congress and the Executive branch to insure that all legislation clearly states that this Agency has no law-enforcement or criminal justice purpose.

(b) As a "criminal justice agency," the Central Intelligence Agency would be subject to the regulatory provisions of Title 2 of S. 1428 concerning the collection, dissemination, and use of criminal justice information by criminal justice agencies and the provisions for the administration and enforcement of these provisions by the Commission created in Title 3. Some of these provisions would conflict with the Director's statutory obligation to protect Intelligence Sources and Methods (50 U.S.C. 403); with the Agency's principal statutory duty to correlate and evaluate foreign intelligence and to provide for its appropriate dissemination within the Government using where appropriate existing agencies and facilities (50 U.S.C. 403); and with the Agency's general exemption from provisions of any other law which would require the publication or disclosure of Agency organization, functions, or personnel (50 U.S.C. 403). Among the provisions which raise potential conflicts are the following:

--Sections 204 and 206(a), which provide for the exchange, dissemination and use of criminal justice information for non-criminal justice purposes, would preclude the dissemination of foreign intelligence information to appropriate domestic and foreign consumers where such intelligence contained "criminal justice information."

--Section 204(c), which requires non-criminal justice recipients of arrest record or criminal record information to notify the subject individual, could result in alerting foreign intelligence subjects of the Agency's interest in their activities.

--Section 208, which grants the subject individual (presumably including foreign citizens) access to arrest and criminal record information for personal inspection, could under given circumstances result in betraying this Agency's interest in a foreign intelligence subject or in compromising a sensitive liaison relationship with a foreign service.

--Section 209(b)(2), which would require the identifying and recording of the personnel with access to criminal justice intelligence information within an agency to which such information has been disseminated, could result in disclosing the identities of covert Agency officers.

--Section 302(a)(3), which empowers the "Commission on Criminal Justice Information" to investigate allegations of non-compliance with the Act, could result in Commission access to the most sensitive Intelligence Sources and Methods at the prompting of each allegation of non-compliance.

--Section 302(a)(4) would require the Agency to provide the Commission all information necessary to compile a public directory of "criminal justice information systems" identifying their nature, purpose, and scope. This section could result in the compromise of Intelligence Sources and Methods to the extent that it requires disclosure of Agency holdings on, or interest in, a foreign intelligence subject.

(c) Application to the Central Intelligence Agency of the requirements of Title 2 whenever foreign intelligence information pertains to criminal conduct would undermine the Agency's essential function of gathering, evaluating, correlating, and disseminating foreign positive intelligence in support of the foreign policy-making process. In order to comply with the Act, the Agency would be required to analyze foreign intelligence information against criminal law standards and arrange its information systems and the pattern of intra-Agency intelligence dissemination according to criminal justice values which may be irrelevant to and indeed impede the foreign intelligence process.

5. It is strongly recommended that section 102(5) of S. 1428 be amended to make clear that foreign intelligence collection is not a criminal justice activity.

Section II

1. The Central Intelligence Agency is not a criminal justice agency. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by S. 1428.

2. The Central Intelligence Agency has no general interest in obtaining criminal justice information *per se*. In support of the Director's position as the President's principal foreign intelligence advisor, this Agency must have access to information characterized in S. 1428 as "criminal justice information" where it pertains to a foreign intelligence subject. Indeed, section 102(e) of the National Security Act of 1947 provides:

... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Moreover, section 102(d)(3) of the National Security Act of 1947 imposes on the Agency the duty

... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities

It is conceivable under given circumstances that the Agency would require access to any one of the five classes of information characterized as "criminal justice information" in S. 1428. This is especially true because each class could include information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The limitations in sections 204 and 206(a) on the collection, dissemination, and use of criminal justice information for non-criminal justice purposes would preclude Agency receipt of foreign intelligence information held by domestic agencies and, by implication of section 201(d), held by foreign governments where such information falls within the definition of "criminal justice information" in S. 1428. Such restrictions would impinge upon the Agency's statutory responsibilities referred to above.

3. It is noted that section 205(b) would permit non-criminal justice agencies to use criminal justice information in screening applicants or for approving or reviewing security clearances. The Central Intelligence Agency may also wish to obtain criminal justice information on individuals who are being considered as possible intelligence sources or for operational purposes without initially notifying the individuals under consideration.

4. In those cases where the Agency would be able to obtain criminal justice information under sections 204(a) or (b), it would be required to notify the subject of such records under section 204(c). This notification could result in betrayal of Agency interest in a foreign intelligence subject.

5. It is strongly recommended that S. 1428 be appropriately modified to take into account not only the need for material defined in the bill as "criminal

justice information" by foreign intelligence agencies, but also the need to protect such information in their possession and in some cases protect the fact that they have sought it or have it.

Section III

1. It is believed that the suggested amendments below would satisfy the considerations and statutory conflicts referred to in sections I and II of this memorandum, while preserving the intent and objectives of the legislation.

2. Proposed Amendment to S. 1428:

(a) Strike section 102(5) and insert in lieu thereof the following:

--Section 102(5) "Criminal justice" refers to the activities of a criminal justice agency relating to protection against, detection of, or investigations of criminal offenses as such, or to the apprehension, detention, pretrial release, posttrial release, prosecution, defense, correctional supervision or rehabilitation of accused persons or criminal offenders, adjudication of a charge, or processing requests for executive clemency, but shall not refer to foreign intelligence collection activities where undertaken by an agency of the United States authorized to conduct such activities.

(b) Insert after section 204(i) the following new section:

(j) In the interests of promoting all-sources intelligence production, and in order further to implement sections 102(d)(3) and 102(e) of the National Security Act, as amended, information defined in section 102 of this Act as "criminal justice information" may be made available to the Director of Central Intelligence as directed by the National Security Council, where necessary for foreign intelligence purposes.

(c) Insert after section 103(b)(8) the following new section:

(9) information relating to foreign intelligence sources and methods designated for protection from unauthorized disclosure pursuant to 50 U.S.C. 403.